United Nations AT/DEC/1128

# Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1128

Case No. 1239: BANERJEE Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Julio Barboza, President; Mr. Kevin Haugh, Vice-President; Ms. Jacqueline Scott;

Whereas, on 25 January 2002, Somendu Banerjee a former staff member of the United Nations Development Programme (hereinafter referred to as UNDP), filed an Application requesting the Tribunal:

"7. ...

(c) *to decide* to hold oral proceedings ...

(d) *to order* the Respondent to produce ... records from UNDP ...

8. On the merits ...

(a) *to rescind* the decision of the Secretary-General dated 16 November 2001...

(b) *to find and rule* that the Joint Appeals Board [JAB] ... erred as a matter of justice and equity in failing to recommend the Applicant's reinstatement ... and to recommend the award of appropriate and adequate compensation for the consequential harm done to the Applicant including lost employment, monetary losses and mental anguish as well for the violation of his rights ...

(c) *to find and rule* that the decision of the Under-Secretary-General for Management ... was tainted by bias and prejudice,

based on factually incorrect assumptions, and constituted a gross miscarriage of justice and abuse of authority;

(d) *to order* that the Applicant be reinstated ...

(f) *to fix* ... the amount of compensation to be paid in lieu of specific performance at [39] months of gross salary with corresponding allowances and benefits ...

(g) *to award* ... as cost ... $15,000.00 in legal fees and $500.00 in expenses and disbursements."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 4 June 2002 and once thereafter until 31 August 2002;

Whereas the Respondent filed his Answer on 28 August 2002;

Whereas the Applicant filed Written Observations on 31 December 2002;

Whereas, on 11 March 2003, the Respondent submitted comments on the Applicant's Written Observations, and on 28 March 2003, the Applicant responded thereto;

Whereas, on 30 May 2003, the Applicant submitted a further statement;

Whereas, on 18 July 2003, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case are as follows:

The Applicant joined UNDP as an Assistant Personnel Officer at the P-1 level with the then Personnel Branch, New York, on 15 April 1968. On 25 July 1994, he was appointed as Deputy Assistant Administrator/Deputy Regional Director with the Regional Bureau for Arab States (RBAS). On 1 September 1994, the Applicant was appointed Acting Regional Director, RBAS, with a special post allowance (SPA) to the Assistant Secretary-General level. On 15 August 1995, the Applicant reverted to his prior position of Deputy Assistant Administrator/Deputy Regional Director, RBAS. On 4 September 1996, the Applicant was placed on "unassigned status". Following a brief assigment in Geneva in 1998, he joined the United Nations Fund for International Partnerships (UNFIP) as Acting Executive Director, from March 1998 until July 1999, when he returned to UNDP on an "unassigned post" in the Bureau of Management. On 30

June 2001, after electing to serve his three-month notice period, the Applicant was separated from service.

In January 2000, the UNDP Executive Board approved a restructuring of UNDP and a 25 per cent reduction in Headquarters staff, to be followed by a similar downsizing in the UNDP country offices. In May of 2000, UNDP promulgated the "Policies and Procedures in connection with HQ reduction", providing that all staff who were unassigned or displaced as of June 2000 be given a period of approximately 6 months to search for a suitable post.

On 1 August 2000, the Director of the Office of Human Resources, UNDP, (OHR) informed the Applicant that, given his unassigned status, he had until the end of January 2001 to find appropriate employment and that he was expected to apply for all suitable available openings. The Director, OHR, emphasized that the Applicant would have priority consideration over equally qualified candidates and that OHR would stand ready to actively assist him in locating a suitable post

On 7 August 2000, in his reply to the aforementioned letter, the Applicant expressed concern vis-a-vis the prospects of finding an appropriate UNDP post and raised "the additional consideration of not being able to accept an assignment overseas" because of visa implications and family concerns.

On 27 September 2000, the Applicant wrote to the UNDP Administrator, requesting review of the decision contained in the letter of 1 August.

On 1 November 2000, the Applicant was informed that, no appropriate position had been found for him in New York. Therefore, the Administrator proposed that he apply for field positions away from Headquarters at the Resident Coordinator/Resident Representative (RC/RR) level. UNDP was willing to assist in resolving the Applicant's visa concerns and was "prepared to contact the U.S. Mission and to explore with them the possibility of exceptional treatment in your case".

On 2 November 2000, the Applicant received a reply to his request for review of 27 September. As there had not yet been any decision regarding his contractual status or regarding a reassignment or separation action, his request was premature.

On 28 November 2000, the Applicant filed an appeal with the JAB, contesting UNDP's decision to separate him from service at the end of January 2001 unless a suitable assignment for him was identified by that time.

On 2 January 2001, he submitted a request for suspension of action on the decision to separate him from service as of 31 January 2001.

On 5 January 2001, the Applicant was advised that, for all international professional staff, the search period had been extended through 31 March 2001.

During a meeting on 31 January 2001, the Administrator offered the Applicant an interim position for 15 months: initial detail for three months as Officer-in-Charge in Cairo, followed by a 12-month assignment as Special Advisor to the Associate Administrator. On 12 February 2001, the Applicant replied that he was "ready and available", but that his acceptance of this offer was contingent on UNDP's guaranteeing him an "appropriate, regular and continuing assignment on my return to Headquarters". On 22 February 2001, the Applicant wrote to the Secretary-General, complaining that his return to work in the Organization remained effectively blocked; that the Administrator had advised him that he had been dissuaded by some unidentified members of his senior management team to place him on a post in UNDP; and, that he had no option but to decline the Administrator's offer since it required his "submission to a blatant denial of due process and slander to his professional reputation".

On 22 March 2001, the JAB adopted its report, recommending that the Applicant's request for suspension of action be granted: this request was subsequently rejected by the Secretary-General, on the grounds that any decision to terminate his permanent appointment taken in conformity with the applicable rules and procedures did not violate his rights as a staff member, much less irreparably.

Also on 22 March 2001, the Applicant was informed that the Administrator had decided to terminate his permanent appointment on 31 March 2001 under staff regulation 8.16, with three months notice. Alternatively, he was offered an agreed separation or Special Leave Without Pay (SLWOP) for a period of up to one year in order to continue his search for suitable UN system opportunities.

On 26 March 2001, the Applicant notified the Director, Office of Human Resources that he chose to serve his three-month notice period.

On 22 June 2001, the Applicant again filed a request for suspension of action with the JAB. On 26 June 2001, the Chairperson of the JAB advised the Applicant that his request was inadmissible as the Secretary-General had already made a decision on his case and, according to staff rule 111.2 (c) (iii), "the Secretary-General's decision in of suspension of action cases is not subject to appeal".

The Applicant was separated from service on 30 June 2001.

The JAB adopted its report on the merits on 24 August 2001. Its conclusions and recommendations read as follows:

> "***Conclusions and Recommendations***
>
> 50. ... [T]he Panel concluded that the decision to separate the Appellant was taken in contravention of the provisions set forth in [staff rule] 109.1 (c), as the Respondent did not fulfil [his] obligation to undertake a *bona fide* search for a suitable post for the Appellant. The Panel further concluded that the unproven allegations about the Appellant's willingness to be a team player had unduly prejudiced his chances to find a suitable post, and were a contributing factor in the termination of the Appellant's appointment.
>
> 51. Accordingly, the Panel felt that the Appellant was entitled to compensatory damages on account of the premature and improper termination of his permanent appointment, as well for the material and moral injury he has suffered. The Panel *unanimously* agreed to recommend that the Appellant be granted *three years'* net base salary for the wrongful termination of his permanent appointment, and that he be given the equivalent of three months' net base salary for the deep distress he has suffered as a result of the Respondent's mishandling of the case."

On 7 November 2001, the Under Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

> "The Secretary-General considers that the Board's findings and conclusions above are seriously flawed in law and in fact. Staff Rule 109.1(c) provides, in relevant part, that staff with permanent appointments shall be retained in preference to those on other types of appointments 'subject to the availability of suitable posts in which their services can be effectively utilized'. The explicit wording of the Rule makes it clear that the posts must be 'available' and 'suitable'; contrary to

the Board's understanding, the Rule does not require that such posts should be 'permanent'. Therefore, the Board erred when it concluded that, by not offering you a permanent post, UNDP acted in contravention to that Rule.

In accordance with Staff Rule 109.1(c), you were considered for those available posts, which were suitable, *i.e.*, for which you had the requisite qualifications. The documentation that was submitted to the Board makes it clear that the majority of the vacant D2 posts at Headquarters was not suitable for you, as you did not have the required *recent* field experience, which was the key qualification considered by the Administrator, together with geographical and gender considerations, nor did you possess the strong academic and specialized substantive experience that was required for the other available D2 posts at Headquarters. While you did have the requisite qualifications for two of the D2 posts (DGO and TCDC), in the end you were not found as qualified as the selected candidates.

The Secretary-General further points out that your unwillingness to seek and accept assignments away from Headquarters was not only a serious failure to meet your obligations as a rotational staff member in UNDP but also the reason that you did not meet the requirement of recent field experience for most of the available D2 posts. It is noted that the Board did not consider your responsibility in that regard and its focus exclusively on the posts at Headquarters is inconsistent with its earlier finding that you had no right to be posted at Headquarters. It is further noted that the Board erred in fact when it concluded that the offer that was made to you by the Administrator to serve for 3 months as OIC of the Egypt office in Cairo, followed by 12 months in a D2 Headquarters assignment could not 'be construed as sufficient or adequate efforts to find [you] a post'. On the contrary, despite the fact that you were expected to apply for senior assignments in the field; despite the fact that, as recognized by the Board, you had no right to be placed in a Headquarters position; and despite the fact that you chose not to abide by the UNDP policy on rotation, despite all of this, the Administrator made you a legitimate offer, in good faith, which was not a sham nor was it conditional. You nevertheless chose to reject this offer, which has since then been offered to, and accepted by, another staff member. In the light of the foregoing, the Secretary-General does not agree that the termination of your appointment was 'wrongful' and finds no justification for the recommendation to compensate you in the amount recommended by the Board. He has therefore decided to take no further action on your appeal."

On 23 January 2002, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The decision of UNDP to proceed with the termination of his permanent appointment did not respect the requirements of the Staff Regulations

and Rules or the obligation of good faith and fair dealing in that it was improperly motivated and procedurally flawed.

2. The Respondent failed to apply in good faith the established policies for placement of staff in abolished posts with respect to the Applicant.

3. The Applicant was discriminated against in that UNDP targeted him for separation in part because of an unstated policy of trying to reduce the number of older and longer serving staff members in favour of younger and newer recruits.

4. The forced termination of the Applicant following a *pro forma* notice period, violated his acquired rights as a holder of a permanent contract.

Whereas the Respondent's principal contentions are:

1. The Applicant's termination constitutes a proper exercise of the Respondent's authority in accordance with staff regulation 9.1 (a).

2. Satisfactory and adequate efforts were undertaken to find a suitable post for the Applicant, and he received due consideration for all suitable posts available.

3. The Respondent's decision was not marred by extraneous factors.

The Tribunal, having deliberated from 3 to 25 July 2003, now pronounces the following Judgement:

I. There are two issues before the Tribunal in the present case. The first one is whether the Administration acted correctly when it ordered the displacement of the Applicant from his post as Deputy Assistant Administrator/Deputy Regional Director, RBAS to be sent to an "unassigned status". The second one is, whether all *bona fide* efforts were made to find a suitable post for him in order to avoid his separation from the service of the Organization. As will be discussed below, these two issues are closely interrelated.

II. On the first score, his separation from his post of Deputy Assistant Administrator/Deputy Regional Director, RBAS, seems abrupt and never fully justified, since he was performing his duties with very high qualifications, just as he had done in the past with other tasks that the Organization had entrusted to

him. From that post he was placed on "unassigned status", a decision that the Tribunal finds difficult to comprehend. The Applicant, in his letter of 6 June 1996, states:

> "I am very distressed to have learnt ... that a decision has been taken to replace me imminently without any commitment or evident progress towards determining my next assignment ... Despite the appearance of being summarily reassigned, I have been given no reason why you should wish to relieve me of my functions or remove me from my post, a measure singularly devoid of due process and certainly detrimental to my professional standards and career interests."

The only answer the Applicant seems to have received was a letter of 1 August 2000, from the Director, OHR, UNDP, in which reference is made to the "current budgetary constraints and post reductions" and to the circumstance that unassigned and displaced staff members "may be affected by staff reductions, despite their merits and their willingness to serve". These references completely ignore the fact that the Applicant's post had not been abolished and that he had been arbitrarily displaced from it by the Administration.

III. In fact, the "unassigned status" was rightly compared to an outgoing train from employment in the Organization, by no one less than the Administrator of UNDP, on the occasion of his offer to the Applicant of the Egypt position: "The Administrator stressed that he was offering [the Applicant] a chance to get back to work" and that the Applicant, "given his seniority and his past contributions, was being offered an opportunity 'to get off the train' that was moving along to separate unassigned staff".

IV. Among the information requested of the Respondent by the JAB was the following: "(b) The reasons why the Appellant was removed from his post as Deputy Assistant Administrator/ Deputy Regional Director RBAS in 1996". The answer could not have been more vague:

> "Question (b) is rather more difficult. As the Appellant himself notes, virtually all the principals involved in his removal from the post ... are no longer with UNDP. Those who are still staff members have been either travelling or on sick leave for the last few weeks. At the Appellant's suggestion, Mr. ... was contacted but he said he did not have a clear recollection of what had happened. Ms. ... contacted by e-mail the

> former Director, OHR, Mr. ... now retired. He responded that the exact circumstances of the breakdown between the Appellant and [Assistant Administrator and Regional Director, RBAS] were not clear from his contemporaneous notes, except that [Assistant Administrator and Regional Director, RBAS] wanted the Appellant to move as quickly as possible from his RBAS Office and the Appellant demurred."

In these circumstances, the Tribunal finds the explanation given by the Applicant not at all farfetched: the rationale for his removal from the Deputy Regional Director post was that the newly appointed Regional Director wanted the Applicant "replaced with his own candidate for the Deputy post". But if such was the case, the Administration should immediately have offered him a suitable post and should not have taken advantage of the opportunity to put him on a train of no return with destination to separation from the Organization. If there were no such jobs available, he should have been left in the position he was encumbering with brilliant performance. At any rate, when the Applicant was launched into that unhappy status, the Administration should have made sure that there was no other staff member with less seniority or without permanent contract or with less distinguished service to the United Nations, who should have been put on the train before the Applicant. There is no evidence that the Administration did that, nor did it claim to have done so. Moreover, even when he actually encumbered the post of Deputy Executive Director and Director of Programme in UNFIP he continued to be considered as having "unassigned status". "Unassigned status" apparently dies hard.

V. The conduct of the Administration arbitrarily consigning the Applicant to "unassigned status" must be read in conjunction with the failure of the Administration to make any real effort to obtain a suitable post for the Applicant, as required by the Staff Regulations and Rules. Undoubtedly, had the Administration obtained a suitable job for the Applicant, and if he had accepted the new position, this would have remedied the original vice of effectively declaring him ready for separation, as was done in the year 2000. But no such effort was undertaken by the Administration, as the JAB found. The Applicant applied for eight D-2 posts, and except for the post of Director, Technical Cooperation among Developing Countries Unit (TCDC) - for which he was not selected - he was not even considered for any of them. The Tribunal agrees with the JAB's opinion that at least some of those posts were not dissimilar to the ones

the Applicant had held in the past, and that apparently he was satisfactorily qualified to occupy any of them.

VI. Moreover, external competitors were called to the TCDC post, and, in fact, one of these external competitors was selected for the post. It stands to reason that internal competitors have a priority over external competitors. Even though the "HR policies and procedures in connection with Headquarters reduction" did not exist at that time, the Tribunal may assume that it reflects values and practices prevailing in UNDP up to the moment of being issued. Point 4 of that instrument reads:

> "If no eligible internal candidates are found suitable, vacancies are then opened to externals. In some cases, there are good reasons to anticipate that it will be difficult to find well-qualified internal candidates; in such cases, the post may be advertised internally and externally simultaneously, (OHR is to be consulted in these cases) When a vacancy is advertised at the same time internally and externally, the internal candidates should be given priority among equally classified candidates."

Notwithstanding the rather outstanding antecedents of the Applicant, the selection was undertaken under the impression that the Applicant, as an internal candidate, was not going to be satisfactory.

VII. In view of the above circumstances, the Tribunal is satisfied that a doubt exists with respect to the Administration's *bona fides* in its efforts to place the Applicant in a suitable position. In such cases, the Tribunal's repeated contention that the *onus probandi* falls on the Respondent is amply applicable here. The Tribunal has held in the past that "where there is a doubt that a staff member has been afforded reasonable consideration, it is incumbent on the Administration to prove that such consideration was given". (See Judgement 910, *Soares* (1998), para. IV, citing Judgment No. 447 *Abbas* (1989).) In paragraph IV of *Soares*, the Tribunal held:

> "This rule is interpreted to mean that a good faith effort must be made by the Organization to find alternative posts for permanent staff members whose post are abolished. The Respondent must show that the staff member was considered for available posts and was not found suitable for any of them prior to termination (cf. Judgement No. 85, Carson (1962))."

VIII. The Respondent offers little, if any, evidence that it exercised due diligence in this respect. The Tribunal cannot but agree with the JAB when it found an absence of such due diligence and necessary good faith efforts on the part of the Administration in placing the Applicant in any suitable position after having put him on the fatal train towards termination of employment.

IX. There is an episode that the Respondent invokes as proof of his good faith that, in fact, he offered the Applicant at least one suitable job, namely, a three-month position in Egypt followed by 12 months at Headquarters. The refusal of the Applicant to accept the position was offered by the Respondent as an example of the Applicant's intransigence. The Tribunal holds a completely different view with regard to the real meaning of that offer, due to the circumstances surrounding it and the form in which it was couched. There is a note of the interview between the Administrator and the Applicant in which a record is made of the exchanges between them, in the presence of several witnesses. The offer was preceded by an explanation on the part of the Administrator, as follows:

> "In the effort of the Administrator to place [the Applicant], he was struck by the fact that many had expressed concerns about [the Applicant]. 'Old ghosts have raised their heads'. In particular, the Administrator said that UNDP staff had raised issues on [the Applicant's] willingness to fit in and be a "team player" and that he was too focused on status and rank. The Administrator stressed that as he had no working relationship with [the Applicant], he had no basis to evaluate these concerns. But he wanted to share them with the staff member because [the Applicant] needed to be conscious of how he is perceived by his colleagues. Such concerns would affect his ability to be effective. The Administrator stressed that if these perceptions resonated in any way with the Applicant he should focus on them or there could be a problem down the line."

The offer itself consisted of three months in Egypt and then a year in a non-budgeted post at Headquarters:

> "*While not a budgeted post, the idea would be for [the Applicant] to work first as the OIC and then take on the duties for a year after which time all could take stock. The year would allow [the Applicant] the opportunity to remind the community of colleagues why he had been viewed as a rising star. Assuming that all went well, the Administrator that the UNDP [sic] would make every effort to place [the Applicant] appropriately.*" (Emphasis added.)

This interview entirely clarifies what was the position of the Applicant regarding a group of influential staff members in UNDP and, what is worse, regarding the Administrator himself. Without taking the trouble of verifying the accuracy of the allegations by the virtual jury in the shadows, consisting of those highly placed staff members, or giving the Applicant the opportunity of refuting the features attributed to his character, the Administrator *acted upon* those notions and sent the Applicant, a D-2 staff member, who had acted in the past on the level of Assistant Secretary-General, on a probation job.

Probation it was, and nothing less. This is clearly shown by the words in italics above quoted: the Applicant was given a year to prove that the allegations that had reached the Administrator's ears were unfounded. Then, if everything went well, *i.e.*, presumably if the Applicant could show sufficient humility of character and team spirit, then and only then would the Administration "make every effort to place [the Applicant] appropriately". This can only mean that up to that point, not every effort had been made by the Administration to place the Applicant appropriately. Contrary to the Respondent's contention that the Applicant's decision not to accept the offer was evidence of the Applicant's effort to impose conditions, the Tribunal is satisfied that, in fact, the Applicant simply refused the job because of its probationary nature.

The Tribunal is satisfied that acting upon an unverified notion about the character of a staff member without giving him the opportunity to refute that notion is prejudicial. Acting on prejudice is discrimination.

X. The recorded interview is also illuminating regarding the "unassigned status" of the Applicant. "Old ghosts have raised their heads" said the Administrator, meaning undoubtedly that the prejudice regarding the Applicant was not new, but had its roots in the past. It requires no stretch of the imagination to conclude that those ghosts of the past had also influenced the placement of the Applicant on "unassigned status" when he was arbitrarily displaced from the post he was occupying. This also resulted in the lack of consideration that he suffered when he applied to posts prior to the time he was notified of his impending termination in the year 2000.

XI. Lastly, the Tribunal would like to examine the issue of the Applicant's refusal to accept field assignments - or for not having "recent field experience"- as a cause of his not being offered suitable posts, an allegation of the Respondent that, after the evidence commented upon in some of the previous paragraphs, has a somewhat dubious ring.

The Tribunal would like to emphasize that the principle according to which staff members must accept the positions that management assigns to them, wherever those positions are situated in the world, is central to the functioning mechanisms of the United Nations. Having said that, the Tribunal must dwell upon the manner in which the Respondent, being the decisive instance in the assignment of posts, has applied that rule in the practice of the Organization.

The Applicant has shown, and was not contradicted, that on many occasions field experience or rotation - recent or not - were not considered essential requirements to appoint candidates in several posts. Obviously, field experience and rotation have been applied almost on a case-by-case basis. The Tribunal does not want to pronounce on the wisdom of such a policy, but it is not satisfied that this was how it was applied by the Respondent generally, only that it was applied, selectively, in the case of the Applicant. This was particularly so in the circumstances of the Applicant, who had in his favour the conditions of his children and their need of special schooling, as well as his closeness to retirement age and the distinguished services he had rendered to the Organization. On the other hand, the offer made to the Applicant, on 31 January 2001, by the Administrator was of a temporary post of one year in Headquarters, after a token stay in Egypt. Thus, the Tribunal is satisfied that that field experience or rotation was not a real prerequisite in the placement of the Applicant.

XII. In view of the foregoing, the Tribunal:

1. Orders the Respondent to reinstate the Applicant in a post suitable to his qualities and ability, as well as his seniority, with all salary and benefits;

2. Fixes the compensation to be paid to the Applicant at two years' net base salary at the rate in effect at the time of his separation from service, if the Secretary-General decides within 30 days of

the notification of the Judgement, in the interest of the United Nations, not to reinstate the Applicant; and,

3. Rejects all other pleas.

(Signatures)

Julio **Barboza**
President

Kevin **Haugh**
Vice-President

Jacqueline R. **Scott**
Member

Geneva, 25 July 2003

Maritza **Struyvenberg**
Executive Secretary

BANERJEE